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telecom, inc.

JUL 25 2000

July 20, 2000

EX PARTE

Magalie Rowan Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Es Parte CC Docket No. 99-142

Dear Secretary Salas:

Enclosed are two copies of an Ex Parte submission in the above-referenced matter for inclusion in the public record. The enclosed submission was mailed to the Commission on this same date under separate cover.

Sincerely,

Dennis D. Ahlers

Dennis D. Ahlers
Senior Attorney
Eschelon Telecom, Inc.

DDA:tlg
Enclosures
cc: Patrick J. Donovan, w/encl.
Tiki Gaugler, w/encl.

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telecom, inc.

EX PARTE

Lawrence Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S. W.
Washington, DC 20554

Re: Ex Parte CC Docket No. 99-142

Dear Chief Strickling:

Eschelon Telecom, Inc. (Eschelon) respectfully requests that the Commission promptly grant the Petition for Declaratory Ruling filed by KMC Telecom, Inc. on April 26, 1999 (KMC Petition) in the above-referenced Docket. [1] In its Petition KMC requested that the Commission establish a "fresh look" opportunity enabling ILEC customers to receive service from competitive service providers, like Eschelon, without incurring unreasonable ILEC contract termination penalties.

Eschelon Telecom, Inc. is a CLEC that provides facilities-based and resold local and long distance telecommunications services in the states of Minnesota, Utah, Arizona, Oregon, Washington and Nevada. Eschelon's experience with termination penalties is much like that of KMC. In five of the six states in which Eschelon operates, Qwest Communications (Qwest), formerly U S WEST, is the primary ILEC. It is Eschelon's experience that U S WEST has made it a policy to sign up customers for long term contracts that include unreasonable termination penalties for customers who terminate service prior to the expiration of their contract. Indeed, in most of the states in which it operates it has tariffs on file that allegedly allow U S WEST/Qwest to charge such penalties. It is, therefore,especially enlightening to review the comments of Qwest in this Docket. In its Comments Qwest agrees with KMC "that excessive termination penalties inhibit CLEC entry because they prevent customers from switching carriers once competitors enter the market." Qwest Comments at 3. Qwest has urged this Commission to "declare use of such excessive termination penalties to be anti-competitive and unlawful." Qwest Comments at 5. Given the recent merger, this reasoning now applies to Qwest's own tariffs and practices. Eschelon urges Qwest and the FCC to act in a manner consistent with Qwest's Comments in this Docket.

[1] KMC Telecom, Inc. Petition for Declaratory Ruling, CC Docket No. 99-142 (filed April 26, 1999).

The record in this proceeding demonstrates that unreasonable termination penalties are a barrier to competition.[2] Eschelon's experience with Qwest and Nevada Bell is similar to those instances cited by other CLECs where customers could not even consider switching to the CLEC's service if they had to pay the ILEC's enormous termination penalty. In Eschelon's experience it is the unreasonable magnitude of the charges coupled with the incumbent's dominant market share, rather than the mere existence of term contracts, that is the primary problem. These penalties often far exceed the discounts provided to the customer in return for their agreement to obtain service for a definite term. Ironically, were these outrageous penalties included in contracts of unregulated businesses as liquidated damages they might well be unenforceable as improper penalties because they bare no relationship to actual damages. *See*, *Kothe* v *R.C. Taylor Trust*, 280 US 224, 226 (1930). However, because they are in state commission tariffs they are being given the imprimatur of the state.

The Commission should not allow any termination charge to exceed the difference between the amount the customer has already paid and the additional amount the customer would have paid had the customer originally signed up for the actual term completed. This allows for recovery of costs but does not allow imposition of an anti-competitive penalty.

These unreasonable and unconscionable penalties are most often imposed on small business customers-those businesses least likely to have the expertise or resources to analyze and negotiate each paragraph of their telecommunications contracts while, at the same time having the greatest need to find the lowest cost, most responsive service. These unreasonable termination penalties are often simply a trap for the unwary. They hurt both the customer and the competitor and stymie competition. They are, as KMC has asserted, a significant barrier to competition. Each day that goes by with them in

[2] See, Comments of Allegiance Telecom, Inc. at 2; Joint Comments of the Association for Local Telecommunication Services, Net2000 Communications, Inc., and Teligent, Inc. at 2-3; Comments of McLeodUSA Telecommunications Services, Inc. at 2; Comments of MGC Communications Inc. at 3-5; and Comments of Telecommunications Resellers Association at 3.

place is another day of delay for the development of a fully competitive telecommunications marketplace.

Accordingly, Eschelon Telecom, Inc. urges the Commission to promptly address and grant KMC's Petition.

Sincerely,

Dennis D. Ahlers
Senior Attorney
Eschelon Telecom, Inc.

DDA:tlg
cc: Robert Atkinson
Michelle Carey
Claudia Pabo